UNITED NATIONS

ECONOMIC
AND
SOCIAL COUNCIL

LIMITED
E/CEPAL/L.153/Rev.1
June 1977
ORIGINAL: ENGLISH

C E P A L

Economic Commission for Latin America

A LATIN AMERICAN CONVENTION ESTABLISHING UNIFORM CONDITIONS OF LIABILITY FOR ENTERPRISES OFFERING INTERNATIONAL TRANSPORTATION AND RELATED SERVICES

77-6-1437-100

1. Introduction

A significant increase in recent years in the volume of internationally traded goods which are transported overland among the Latin American countries has revealed a number of serious institutional deficiencies which are obstructing the creation and expansion of efficient international railway and highway transport services. For decades the Latin American continent has made great and largely successfully efforts to complete a physical infrastructure which assures ready access among neighboring countries. These efforts, however, have not been complemented by parallel measures to create an adequate institutional infrastructure which permit highway trucking and railway enterprises to make full use of the physical infrastructure.

One of the areas where the need to establish region-wide norms is most obvious concerns the civil liability of enterprises which provide international land transport services for loss, damage or delay to goods while in their care. This civil liability is at present governed nearly exclusively by national commercial codes, which in general do not explicitly contemplate this aspect of international transport by highway and railway. In addition, most of the national codes hold the transporter responsible for the full value of goods which are lost, damaged or delayed. The lack of international norms regarding civil liability has a number of serious consequences for intra-regional trade:

a) Whenever carriers are liable for the full value of the goods they transport, it is extremely costly --if not impossible-- for them to obtain civil liability insurance.

/b) As

b) As there is no clear separation of responsibility between the various persons liable for the goods during transport, it is extremely difficult for the shipper to establish who is liable for the loss, damage or delay.

c) There is no clear specification of the procedures available to the shipper or the insurer of his goods to obtain compensation from the transporter when goods are lost, damaged or delayed in international transport.

As a result of this situation, freight rates tend to be higher than necessary because carriers cannot insure their liability. In addition, cargo insurance premiums also tend to be excessive because cargo insurers encounter great difficulty in obtaining judgments against carriers.

In the past the lack of regional norms on the liability of international transporters by road and rail was of slight consequence. Nearly all intra-regional trade was by sea, and the civil liability of shipping lines is rigidly defined by the Brussels Convention of 1924. More recently, however, integration efforts have led to an increment in trade of high-value manufactured goods and exporters and importers have turned to land transport for the more frequent, door-to-door transport services which they require. Increasingly, transporters, shippers and government authorities are becoming aware of the need to adopt regional norms such as those established in Europe many years ago. 1/

1/ International Convention concerning the Carriage of Goods by Rail (CIM) done at Berne on 25 February 1961 and revised recently on 30 April 1970; Convention on the Contract for the International Carriage of Goods by Road (CMR), signed at Geneva on 19 May 1956.

/Thus, for

Thus, for example, the First Meeting of Insurance Superintendents of the Andean Group Countries, held in Lima from 18 to 20 October 1976, agreed to study different aspects of international transport insurance and requested CEPAL and UNCTAD to prepare working documents which could be considered at the second meeting to be held in Caracas in June 1977. Also, the Thirteenth General Assembly of the Latin American Shipowners Association (LASA), held in Buenos Aires from 10 to 12 November 1976, agreed to recommend to the Governments of the LAFTA countries that they, with the co-operation of LAFTA and CEPAL, sponsor the preparation of a convention to establish regional norms to regulate multimodal transport operations and in particular a civil liability regime for those modes whose civil liability is not already governed by international convention within the LAFTA region.

In addition, the Sixth Meeting of Ministers of Public Works and Transport of the Southern Cone, held in Asunción from 10 to 15 November 1975, agreed to promote the preparation of an International Multimodal Transport Convention for the countries of the Southern Cone and requested collaboration from CEPAL in this effort. In turn, the Seventh Meeting of Ministers, held in Montevideo from 11 to 17 November 1976, examined a working document prepared by CEPAL 2/ and requested that CEPAL, as it continued its work on multimodal transport, give first priority to a study which would permit the

---

2/ CEPAL, El transporte multimodal internacional en el Cono Sur y su necesidad de apoyo institucional (E/CEPAL/L.139), octubre 1976.

/establishment of

establishment of a civil liability regime for modes not already covered by international conventions.

The Second Latin American Regional Preparatory Meeting on an International Multimodal Transport Convention, held in Buenos Aires from 14 to 17 December 1976 under the auspices of the Latin American Economic System (SELA), requested that CEPAL extend the scope of the work on a civil liability regime underway for the Ministers of Public Works and Transport so as to cover the entire Latin American region.

Finally, the 29 member countries of the Economic Commission for Latin America which took part in the seventeenth session of the Commission, held in Guatemala City from 25 April to 5 May 1977, instructed the secretariat of CEPAL to assign priority in its programme of work to a plan of action designed to culminate in the adoption of a Latin American convention laying down uniform conditions as regards the liability of enterprises providing international transport and associated services.

2. Characteristics of the proposed convention

The objective sought by the Latin American Governments in requesting CEPAL to prepare a draft convention is clear: to provide uniform conditions of liability for all Latin American enterprises offering international transportation, within Latin America, not already covered by other international conventions. Existing regional and world conventions which establish uniform conditions of liability for transport enterprises for loss, damage or delay in delivery of

/merchandise regulate

merchandise regulate the entire transport contract and not just that part of the contract dealing with the transporter's liability. For this reason, one of the first tasks which CEPAL has undertaken is to investigate what aspects must be covered by the proposed convention in order for it to fulfil the objective sought by the Governments while at the same time be compatible with provisions of national legislation, especially commercial codes, which cover aspects not included in the convention.

This investigation has identified five areas which require detailed analysis. First, all measures of liability must be evaluated, defined and limits placed thereon in order to promote uniformity. Second, contractual freedoms must be evaluated to determine whether the application of the proposed convention should be mandatory or voluntary. Third, the necessary extent to which the proposed convention "preempts" national laws, and the methods in which such bodies of laws may be reconciled, must be evaluated. Fourth, the scope of application, i.e., the persons and transactions to which the proposed convention is directed, must be evaluated and defined carefully to preclude unforeseen application. Fifth, the various methods for settling disputes should be evaluated to ensure prompt and equitable resolution.

a) Measures of liability

A Latin American convention dealing solely with the limits of a carrier's liability should include certain other supportive provisions so that the desired legislative results can be obtained.

/However valid

However valid the measure of a carrier's liability in monetary terms may be, it is not the only measure of such liability. Other measures of liability, equally valid, are the period of liability, basis of liability, basis upon which no liability will be imposed, and circumstances under which the carrier may lose his right to limit liability. Each of these measures of liability must be evaluated, defined, and limits placed thereon for such a convention to be productive of the desired results. The following are examples of such measures of liability:

i) The period of liability would normally include not only the time during which the carrier has control over the goods of the shipper, but also a reasonable statute of limitations period after delivery.

ii) The basis of liability are those circumstances or persons, over which the carrier has control, which result in loss, damage or delay in delivery and for which, after the receipt of notification of a loss within a reasonable period of time after delivery, the carrier must respond in damages.

iii) The basis for which liability will not be imposed are, for example, inherent vice of the goods, force majeure and failure by the shipper to inform the carrier of special circumstances of care necessary for the goods transported.

iv) The monetary limits of liability are those amounts the carrier must respond in damages to the injured party,

/after it

after it is determined that said loss, damage or delay in delivery occurred during his period of responsibility and from circumstances or persons over which the carrier has control.

v) Termination of the right to limit monetary liability should occur if the loss, damage or delay resulted from an act or omission done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

For the imposition of liability on a carrier it is necessary that an event occur, over which the carrier has control and which has been defined as within his basis of liability, during the time period for which the carrier is responsible to the shipper. Thus, the term "measures of liability" includes many factors, other than a monetary limit, to be properly understood.

b) Applicability - voluntary or mandatory

A contract of carriage is executed between a carrier and shipper and governs their legal relationship while the carrier is charged with the responsibility for the shipper's goods. Normally, absent any governmental control, the parties are free to negotiate any form of contract. The provisions written into the contract of carriage between the two parties is commonly referred to as private law. The parties negotiate these provisions to govern a private, non-public, relationship.

/The sovereign,

The sovereign, on the other hand, through the medium of public law regulates the aforementioned contractual relationship - if it is in the general public interest to do so. This public law regulation may take many forms. For example, a reduction or elimination of the parties' contractual freedoms may be deemed necessary because of contracts detrimental to the general public interest. During the early development of the English Common Law, a common carrier and shipper, when executing a contract for the carriage of goods, were governed by the provisions of the common law. Carriers, because of contractual freedoms, began to execute contracts with clauses nullifying the onerous provisions of the common law. Only with the active intervention of the sovereign was this situation reversed. The legislative intent of the proposed convention could be easily nullified by such a clause in the contract of carriage. To prevent the nullification of such a convention it seems necessary that it include a provision making its applicability mandatory.

c) Preemption

When a sovereign begins to regulate any body of law, or any part thereof, for the public benefit, it is commonly referred to as "preemption". An entire area need not be preempted unless such total preemption is mandated by the need for total uniformity. If the entire body of law, relevant to the international carriage of goods, were preempted, the contents of every contract of carriage would be predetermined. As is the usual case, only when there is a demonstrated need are segments of any given area preempted.

/As the

As the proposed convention will provide only for uniform conditions of liability for enterprises offering international services, it would be considered a partial preemption of existing States' laws. With any partial preemption two questions immediately arise. First, will the "remaining law" continue to function with part of it now missing? Second, will the regulations adopted function efficiently and effectively with the "remaining law"? This situation is made somewhat more complicated by the imposition of another body of law - this proposed international convention. Whereas before there was the interworking of public and private law, there is now the interrelationship between public and private law with an international convention. The reconciliation of the national public and private laws with an international convention can be accomplished in many ways. For example, by the national legislature declaring the international convention the supreme law with any provision of existing national law contrary thereto a nullity; or by the national legislature modifying its laws to agree with the international convention. Although the proposed convention will only provide uniform conditions of liability for enterprises offering international services in Latin America, such a partial preemption is valid because the laws of the adopting states and this convention may be reconciled.

d) Scope of application

When a sovereign drafts a regulation it does so with the intent to exercise control over certain situations and persons. In order not to have unexpected consequences, the scope of application of such

/a regulation

a regulation must be defined clearly. So also is it with the scope of application of a convention on international carriage of goods, concerning the liability of carriers. To preclude unplanned application the situations and persons to which this convention applies must be defined with care.

The carriage of goods in international commerce means just that - wholly domestic carriage, which begins and ends totally within the same state is simply not within the purview of international carriage. International carriage then, is carriage that takes place between two or more states. The circumstances under which the goods can change their complexion from domestic to international and back to domestic are many and varied. For example, the change might occur when the goods pass through customs of the states of departure and ultimate destination; or when the shipper has the "express intent" that such goods shall be, and are, carried internationally until receipt by the consignee. Although the first of the above examples involves physical movement of goods, and is therefore easily applied by all concerned parties, it fails to include the total period of international carriage. Goods enter the stream of international commerce with the "expression of intent", by the shipper, that specific goods will be transported internationally and ends when the goods are delivered to the consignee. All handling and storage of the goods, whether transit or long term which occurs after the expression of intent and before delivery to the consignee, is an integral part of such transportation and should be considered within the scope of the proposed convention.

/Although the

Although the "expressed intent and delivery" view of international transportation seems broad enough to apply to all forms of international carriage, the proposed convention would not apply to the air and sea portions of such carriage. In effect, the proposed convention would provide uniform conditions of liability for all enterprises offering international transportation services not already covered by other international conventions. As international carriage by air and sea already have conventions providing uniformity of liability for carriers, these modes of carriage are not within the scope of the proposed convention and are, therefore, excluded.

e) Resolution of disputes

For the resolution of disputes arising under such a convention there are normally two systems employed - one voluntary or arbitral and the other, in the absence of the first, obligatory or judicial. Arbitration or the voluntary method for resolving disputes, must be agreed to by the contracting parties and written into the contract of carriage. As regulation of arbitration is beyond the scope of the present proposed convention, only the judicial means for resolving disputes will be discussed.

Jurisdiction of a court is generally defined as the authority to hear a certain class of disputes, render decisions thereon and have such decisions enforced. Authority to hear and decide a dispute is, in reality, a recognition of the jurisdictional competence of a court. For example, there are specialized courts with authority to hear only admiralty, tax, patents and copyright

disputes. When any state creates these special courts the remaining courts within the same state lack the jurisdictional competence to hear and decide such classes of disputes. The power of a court to have its decisions enforced is directly related to jurisdictional competence. If a court has been granted such competence to hear and decide a case, then its decisions should be enforced by any other state. Jurisdiction must be extended to a sufficient number of forums to allow litigants access to the judicial system. Such access is customarily allowed at the residence and/or places of business of the litigants, and situs of the loss producing event. However, where difficulties of producing evidence, witnesses in another state, the defendant should be allowed, absent some other intervening circumstance, to remove the dispute to another jurisdiction.

3. Plan of action

A Latin American convention establishing uniform conditions of liability for enterprises offering international transportation and related services seems feasible if the following supportive provisions are included. First, the measures of liability must include period of liability, basis of liability, basis upon which liability will not be imposed, monetary limits of liability, and the circumstances under which a carriers' right to limit liability will be lost. Second, as many states have sufficient contractual freedoms allowing clauses which would nullify the proposed

convention, a provision is necessary making its application mandatory. Third, the scope of application should be limited to those transactions and persons involved in the handling, storage, and carriage of the goods after the expression of intent that such goods shall be, and are, carried internationally until receipt by the consignee. Fourth, the resolution of disputes should be limited to the judicial system as a regulation of arbitration is beyond the scope of the proposed convention.

The preparation and adoption of such an international convention is necessarily a time-consuming process. In order for this process to proceed as efficiently as possible and to culminate in the approval of a regional convention, the United Nations Economic Commission for Latin America has adopted the following four-phased plan of action:

a) The first phase will be a consulting phase in which ideas are gathered to assist in drafting the proposed convention. During this phase the CEPAL secretariat will consult with appropriate Latin American forums concerning this document and draft articles which reflect the ideas presented here. Among these forums are the Advisory Commission on Transport of LAFTA (Montevideo, June 1977), the Eighth Meeting of Ministers of Public Works and Transport of the Southern Cone (Argentina, fourth quarter of 1977), and the Third Latin American Regional Preparatory Meeting on an International Multimodal Transport Convention (third quarter of 1977). Also, comments and suggestions will be invited from UNIDROIT, UNCTAD and other agencies which are in a position to contribute to the preparation of the proposed convention.

/b) In

b) In the second phase, the secretariat of CEPAL, in accord with resolutions 356 (XVI) and 381 (XVII), will call a specialized meeting of government experts which will draft the proposed convention, taking into account the studies prepared during phase I, for the consideration of the Governments of the region.

c) At the satisfactory conclusion of the second phase, the Commission will authorize the convening of a conference on a Convention Establishing Uniform Conditions of Liability for Enterprises Offering International Transportation and Related Services.

d) The proposed plan of action will conclude with the conference which will finalize and approve the convention.